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CONFESSIONS IN CRIMINAL LAW—INDIAN EVIDENCE ACT S. 30.

When more persons than one are being tried jointly for the same offence, and confession made by one of such persons affecting himself and some other of such persons is proved the Court may take into consideration such confession as against such other person as well as against the person who makes the confession.

Made :—*Garth C.J.* appears to have been of opinion in *Empress* v. *Ashootosh Chuckerbutty*, 1878, I.L.R. 4 C. 483, that a confession under S. 30 must not be one made at the trial, for he says at p. 488 :—"The word 'proved,' in S. 30 must refer to a confession made before hand." In *Imperatrix* v. *Tanyavalad Shivan*, 1890, 14 Mo. Jur N. S. 516, it was held that S. 30 is not to be read as if the words "at the trial" were inserted after the word "made," and the word "recorded" substituted for "proved," that, therefore, a confession made at any time by one of several accused persons, under a joint trial for the same offence, can be taken into consideration under S. 30 as against the other accused persons. The facts of the case are not set forth; but if the confession was made before the trial, and if it was contended that it was not within S. 30 because not made at the trial (and this appears to have been the case from the words "*made at any time*"), and that S. 30 was restricted to confessions made during the trial, this case is opposed to the view of *Garth. C. J.* If, however, the confession was made during the trial, and it was sought to *admit* it on that ground, the ruling would favor the opinion of *Garth, C. J*; but then the words of the judgment "made at any time" would have to be read as "made at any time *before* " : a construction hardly possible. In no reported case has it ever been objected to the

admissibility of a confession that it was made at the trial. In *Empress* v. *Chandra Nath Sirkar*, 1881; I. L. R., 7 C. 65, and *Empress v. Lakshman Bala*, 1882, I. L. R., 6 B. 124, the objection to the reception of the confessions taken and recorded by the Sessions Judge at the trial was not to the fact of their having been made at the trial, but to their not having been "*proved.*" The Criminal Procedure Code of 1882 (S.S. 342, 364, corresponding with Act X of 1872, S.S. 345, 346) allows the examination of the accused at their trial, and requires the Court to take down their confessions: and it is an every-day practice to record confessions at the trial, and take them into consideration, under Section 30, against the co-prisoners.

Confessions made at any time before trial are admissible under S. 30 (Vide *Empress* v. *Ashootosh Chuckerbutty* and *Imperatrix v. Tanya, Supra*), whether made before or after being accused of or charged with an offence, no restriction such as that it must be made after accusation or charge, is to be found in the section itself: and having regard to its principle, it is evident that a confession made before accusation or charge is within it, as the guarantee sought for, as its basis, exists independently of the time of making the confession, whether before or after accusation or charge. Of course *Queen Empress* v. *Jagat Chandra Mali*, 1894 I. L. R. 22 C. 50, does not really decide that a confession, to be taken into consideration under S. 30, must be made after accusation. V's statement of 27th February, was not a confession but an admission, and hence was not evidence against J, nor was it evidence against herself under S. 162 of the Criminal Procedure Code, she being then a witness, though it would be otherwise admissible under the Evidence Act (S. 25). Her statement of 2nd March was a confession. The language of the judgment must be taken with reference to the facts of the case, and not to imply that if V. had been an *accused* person at the time of her first statement of 27th February, it would have been admissible.

It is not necessary that a confession, to be taken into consideration, should have been made in the presence of the co-prisoners against whom it is offered in evidence. S. 30 provides that when a confession made by one prisoner is proved, it may be taken into consideration as against any other person tried jointly with

him, but it is not enacted that a confession must have been made in the presence of that person (*High Court Pro*: 31*st July* 1885. *Weir* 3rd edition 499). Provided a confession is duly proved afterwards, it is immaterial whether or not the co-prisoners were present at the time of making it. The cases *Empress v. Chandranath Sirkar* and *Empress v. Lakshman Bala* are not opposed to this view. There the confessions were objected to not merely because they were made during the absence of the co-prisoners, but because they were not afterwards "proved" in any way, nor was opportunity given the co-accused to know what had been said against them, so as to deny them. But it was admitted, tacitly in the first, and clearly in the second case, that S. 30 allowed confessions to be used against another prisoner though made in his absence, provided of course it was brought to his notice or otherwise "proved." In *Queen Empress* v. *Bepin Biswas*, 1884, I. L. R., 10 C., 970, it was indeed said that confessions of two of several accused persons made in the absence of the others are of *no weight* against the latter. The confessions were made before the Magistrate, but it does not appear from the report whether they were *proved* at the trial. If they were proved at the trial, it is irreconcilable with the above rulings; but if not, then it falls within the class of cases to which the two preceding ones belong and is not inconsistent. It should also be borne in mind that it does not decide such "confession to be absolutely inadmissible, but that they are of "no weight."

Proved.—When a confession has to be used for the purposes of S. 30, the person to be affected by it has a right to demand that it be strictly proved and shown to have been, in all essential respects, taken and recorded as prescribed by law (C.P.C., 1872, S. 122, now Act. X. of 1882, S. 164) is in manner by Ss. 345, 346 (of Cr.P.C., 1872, now Ss. 342, 364), (*Queen* v. *Chunder Bhattacharjee*; 1875, 24 W.R., 42).

When a confession is taken in the absence of the other prisoners and the latter have no opportunity of denying or even of knowing what their fellow-prisoner has said, *e.g.*, when it has not even been read over to them afterwards, it cannot be said that the confession has been "proved" (*Empress* v. *Chandranath Sirkar*, 1881, I.L.R., 7 C. 65, *Empress* v. *Lakshman Bala*, 1882, I. L. R., 6 B, 124); but if it has been read over to them or in any way "proved", it

may be taken into consideration against them (*Empress* v. *Lakshman Bala*).

Court.—The word "Court" in S. 30 means not only the Judge, in a trial by Judge and Jury, but includes both Judge and Jury. (*Queen* v. *Narain Tel.* to the contrary, overruled *Empress* v. *Ashootosh Chuckerbutty*, 1878, I.L.R., 4 Cal. 483).

May take into consideration.—The words "may take" are not intended to be permissive or discretionary, but imperative. Whenever there is a confession admissible under this section, in satisfying the terms of it, the Court is not at liberty to take it into consideration or not, at its discretion, against the others, but must do so though it may attach no *weight* at all to it, if it is not corroborated as required by law. The *dictum* of *Phear J.* in *Queen* v. *Sadhu Mundul* 1874, 21 W. R., 69, seems opposed to this view. But it was held in *Empress* v. *Rama Birapa* 1879, I. L. R., 3 B. 12, on the contrary, that when more persons than one are jointly tried for the same offence, a confession made by one of them, if admissible in evidence at all, should be taken into consideration against all the accused, and not against the person alone who made it.

We now come to the question of the *weight* to be attached to the confessions of co-prisoners as against each other, after their admission in evidence; and it will no doubt depend on the probable force of such confession. (1) *If there is (a) absolutely no other evidence in the case, (b) or the other evidence is inadmissible, such a confession alone will not sustain a conviction* :—(a) In the case in *Proc. Jan.* 24, 1873, 7 M, Hc. R.Ap. 15, two prisoners were convicted under Ss. 312, and 203 I.P.C., and there was not, as the Court observed, a particle of evidence against the 2nd prisoner, except the confession of the co-prisoner. It was held to be a case of no evidence, and the conviction was set aside. This case was followed by the same Court in *Regina* v. *Ambigara Hulagu*, 1876, I. L. R., 1 M, 163. So also it was held in *Empress* v. *Bhawani*, 1878, I. L. R., 1 A, 664 and *Empress* v. *Ram Chand*, 1878, I. L. R., 1 A, 675, that a conviction of a person who is being tried together with others for the same offence cannot proceed merely on the uncorroborated statement in the confession of one of such other persons, and there existing against the appellants no other evidence than such state-

ments, the conviction was in both cases set aside. The same principle was laid down by a Full Bench of the Calcutta High Court in *Empress* v. *Ashootosh Chuckerbutty*, 1878, I. L. R., 4 C, 483, where there was no other evidence against two of the prisoners except such confession. It was held that the confession of a prisoner affecting himself and another is, when duly proved, admissible against both, but such second person cannot, when it is uncorroborated as against him, be legally convicted on it. *Garth C.J.* laid down the duty of the Court in such cases that no Court ought to convict on such confession alone. A Sessions Judge trying such a case before a Jury, ought to direct an acquittal. If a prisoner were convicted on such evidence, whether by Jury or otherwise, and were to appeal to this (High) Court, the conviction ought to be set aside. (Ib. p. 490.)

The Bombay High Court has also decided similarly in *Queen-Empress* v. *Khandia Bin Pandu*, 1891, I. L. R., 15, B. 66. There is thus a complete unanimity of opinion in the several High Courts upon this point. (*b*). Where the only evidence against the 2nd prisoner was a confession made by the 1st prisoner, and a statement made by the 2nd prisoner to the police,—held that the statement of the 2nd prisoner being inadmissble, he could not be convicted solely on the evidence of the 1st prisoner (*Regina* v. *Ambigara Hulagu*, 1896; I. L. R., 1 M, 163).

The reasons for this rule are (i) S. 30 of the Evidence Act is an exception, and its wording shows that the confession is merely to be an element in the consideration of the evidence. (*Proc.* 24, *Jan* 1873, 7 M, H. C. R. Ap. 15). In other words, the old law required conviction to be based on other evidence than a confession of a co-prisoner. S. 30, while allowing such confession to be taken into consideration, does not do away with the necessity of the other evidence. Then the wording "the Court may take into consideration", shows it is to be an element in the consideration of the evidence. (ii). The confession of a co-prisoner is not "evidence" under S. 32, hence cannot alone form the basis of a conviction. There is a conflict of opinion between the several High Courts upon this question. In the Madras High Court it was held in *Proc.* 24, *Jan.* 1873, 7 M, H.C.R., Ap. 15, that a conviction founded on such confession alone was a case of "no evidence." In *Queen-Empress* v. *Kaliyappa Gounden* 1883, Weir 3rd Ed. 494, it was said that

although confessional statements may be considered, ... they cannot be accepted as evidence of any fact necessary to constitute the offence. It was held in *Imperatrix* v. *Bayagi Rom Andu,* 1886, 14 Indian Jur. N. S. 384, by the Bombay High Court, that the statement of a co-accused is not technically *evidence,* within the definition given in S. 3. And again in *Queen-Empress* v. *Khandia Bin Pandu,* 1891, I. L. R., 15 B, 66., the same court decided that such confessions "could be taken into consideration" against the accused, but that they were not evidence within the definition given in S. 3, and they could not, therefore, alone form the basis of a conviction. The Calcutta rulings are not consistent *inter se.* In *Queen* v. *Naga* 1875, 23 W. R., 24; *Phear J. said* "We find the Legislature avoids saying that confessions of this sort are *evidence* and may be used as evidence, ... it says merely the Court '*may take into consideration*' such confession." The same view of S. 30 was taken by *Jackson J.* in *Queen* v. *Chunder Bhattacharjee* 1875, 24 W. R., 42, and by *Markby & Morris J.J.* in *Queen* v. *Narain Tel* 1875, (mentioned in I. L. R., 4 C, 485.) But in *Empress* v. *Ashootosh Chuckerbutty,* 1878 I. L. R., 4 C, 483, the Full Bench laid it down that the confession of a co-prisoner is "evidence" for the purposes of S. 30, though they do not appear to hold that it is so according to the definition of "evidence" in the Evidence Act itself. (iii) But regarded even as evidence and taken at its highest value, *viz,* where the confession implicates oneself more than another, the guarantee flowing therefrom is far too weak to found a conviction upon it alone; hence corroboration should be required in every case. The degree of corroboration required will depend on the comparative probative values of the different kinds of confessions, and will be greatest in the case of confessions implicating co-prisoners more than the maker (iv). If instead of being the statement of a fellow-prisoner, it had been evidence given on oath and examined as a witness in the case, it would not have been any thing other than the evidence of an accomplice, which generally requires corroboration to make it trustworthy, (*Queen* v. *Mohesh Biswas* 1873, 1 G. W. R., 16, *Queen* v. *Sadhu Mundul* 1874, 21 W. R., 69, 70, *Regina* v. *Malappa Bin Kapana* 1874: 11 B, H. C. R., 196. *Empress* v. *Ashootosh Chuckerbutty,* 1878: I. L. R., 4, C, 483), and if the testimony of an accomplice, given before the Court under process of careful examination and capable of being tested by

cross-examination, is yet, by its nature, such that, as against an accused, it must be received with caution; still more so must the confession of a fellow-prisoner, which is only the bare statement of an accomplice limited to just so much as the confessing person chose to say and guaranteed by nothing except the peril into which it brings the speaker, and which it is generally fashioned to *lessen?* (*Queen* v. *Sadhu Mundul*, 1874, 21 W. R., 69; *Queen* v. *Naga* 1875, 23 W. R., 24; *Empress* v. *Bhawani*, 1878 I. L. R., 1 A 664 *Empress* v. *Ashootosh Chuckerbutty*, 1878, I. L. R., 4 C, 970; *Queen Empress* v. *Bepin Biswas*, 1884 I. L. R., 10 C, 970; *Queen Empress* v. *Dosa Jiva*, 1886 I. L. R., 10 B, 231; *Queen Empress* v. *Krishnabhat*, 1885 I. C. 319; *Queen Empress* v. *Ram Saran*, 1885 I. L. R., 8 A, 306; *Queen Empress* v. *Alagappan Bali*, 1886 Weir 3rd Ed. 449 A; *Imperatrix* v. *Babaji Bin Lathu*, 1886 14 I. J. Ns., 176; *Imperatrix* v. *Ganapabhat*, 1889 14 I. J. N. S. 20.) It is true that, in strict law, a conviction is not illegal under S. 133 of the Evidence Act merely because it proceeds upon the uncorroborated testimony of an accomplice, but this section applies only to accomplices *as such*, and not to confessing co-prisoners. Besides the confessions of co-prisoners does not stand on the same footing as the testimony of an accomplice, but is really lower. (*Empress* v. *Ashootosh Chuckerbutty*, 1878 I. L. R., 4 C, 483, 494, 486, *per Jackson & Ainslie J. J.* And although S. 114 (C) is a statutory instance where corroboration of an accomplice's testimony is not necessary, "there is not the slightest indication that the Legislature intended in this passage, by the term 'accounts given by accomplices' any other than accounts given in due course of examination as witness . . . and the mere confessions of prisoners . . . do not come within the scope of this legislative declaration "(*per Phear, J. Queen* v. *Sadhu Mundul*, 1874, 21 W. R., 69, 71; *Empress* v. *Ashootosh Chuckerbutty*, 1878, I. L. R., 4 C, 483, 494, 496, *per Jackson & Ainslie, J. J.*)

There is therefore, no express provision in the Evidence Act to limit the operation of the rule. In every case the confession of co-prisoners, standing alone, are legally insufficient for a conviction.

(*a*). *The confessions of co-prisoners, to be rendered trustworthy, must be corroborated* (*b*) *by independent evidence aliunde, and not by the testimony of accomplices or approvers both as to the identity of all the persons affected by it and as to the corpus delicti*:—(*a*). For the reasons stated above, it is clear that, though admissible under

S. 30 and capable of being taken into consideration, no *weight* can be attached to it, unless it is in the first place, corroborated. The confessions of persons tried jointly for the same offence may, by S. 30, be "considered" as against other persons, but such confessions, when used as evidence against others, stand in need of corroboration (*Queen* v. *Jaffir Ali* 1873 19 W. R., 57). In *Queen* v. *Koonjo Leth*, 1872, 20 W. R., 1, *Phear J.* said at p. 3 "the confession of K of course could not have been legally used against others at all excepting to such an extent as it was substantially corroborated by unimpeachable evidence *aliunde*'. The same Judge laid it down in *Queen* v. *Sadhu Mundul*, 1874, 21 W. R., 69, that a judge should charge the jury that mere confessions of prisoners tried simultaneously, which are in a very qualified manner made operative as evidence, are only to be treated as evidence of a very defective character, and that they require especially careful scrutiny before they can be safely relied on and that they must be corroborated. *Phear J.* again in *Queen* v. *Naga*, 1875, 23 W. R., 24 ruled that the confession of co-prisoners cannot under the Evidence Act, be treated as evidence of ordinary character not distinguished by any special infirmity or qualifications as against other prisoners: but that there was sufficient independent corroboration, in the case before him of the confessions. All the members of the Full Bench agree in *Empress* v. *Ashootosh Chuckerbutty*, 1878, I. L. R., 4 C, 483, that the confession of a co-prisoner was of no weight unless corroborated. A conviction of a person who is tried jointly with others cannot proceed merely on the uncorroborated confession of one of such other persons (*Queen-Empress* v. *Dosa Jiva* 1885: I. L. R., 10 B, 231). In *Queen-Empress* v. *Ram Saran* 1885 I. L. R., 8 A, 306 *Straight* and *Tyrrell JJ.* held that an accomplice and a co-confessing prisoner must both be corroborated before their evidence can be acted on. Where confessions of one of the co-prisoners are admissible against another co-prisoner the utmost value that can be claimed for them is that, if there is other untainted evidence against the accused, they may be "considered" together with such evidence. (*Queen-Empress* v. *Alagappan Bali* 1886 Weir 3rd Ed. 499*a*). And finally it was said in *Imperatrix* v. *Ganapabhat*, 1889, 14 I. J. N. S. 20 that confessions of co-accused cannot, though they may be taken into consideration under S. 30, be treated as of the same value as the evidence of an accomplice; that in such case the corrobora-

tive evidence must be more cogent and should be more strictly examined by the court than when an accomplice gives evidence as a witness. (*b*) In the next place, the corroboration should be by the evidence of independent witnesses, and not of accomplices or approvers. If instead of being the statement of a fellow prisoner, it had been given on oath and subject to cross-examination, it would generally require corroboration derived from evidence which is independent of accomplices: but in reality it does not stand as high as accomplice evidence, but is lower, and hence there is a greater necessity for independent corroboration in the case of confessions of co-accused. Besides, the taint attaching to such confessions is not removed by being doubled in quantity, which latter would be the case if the only corroboration is that afforded by accomplice evidence. (*Queen* v. *Jaffir Ali,* 1873, 19 W. R., 57; *Queen-Empress* v. *Ram Saran* 1885: I. L. R., 8 A, 306.)

The rule laid down in *Queen* v. *Mohesh Biswas* as to the necessity of corroboration of accomplice's testimony by independent evidence applies, *a fortiori*, to the confession of coprisoners. Accordingly *Phear J.* held in *Queen* v. *Koonjo Leth* 1873, *supra* that corroboration of the confession of co-prisoners by independent testimony was necessary. In *Queen* v. *Sadhu Mundul,* 1874, 21 W. R., 69, the confession of the prisoner was borne out by the testimony of the approvers but the court acquitted the accused, there being no independent evidence as to identity. So also in *Regina* v. *Malapa bin Kapana,* where the only evidence was that of the approvers and a confession of a co-prisoner and nothing more, the Bombay High Court set aside the conviction. The prisoners D & S against whom there was no other evidence but that of an approver and the confessions of the co-accused, were similarly acquitted in *Queen* v. *Baijoo Chowdhry*, 1876, 25 W. R. 13, on the grounds of absence of independent corroboration of the approver and co-accused. *Jardine J.* in *Queen Empress* v. *Dosa Jiva*, 1885, I. L. R., 10 B 231 and *Straight* and *Tyrrell J.J.* in *Queen Empress* v *Ram Saran* 1885, I. L R., 8 A 306, expressed opinions to the same effect that a confessing prisoner must be corroborated by independent evidence. And the Madras High Court said in *Queen Empress* v. *Alagappan Bali,* 1886, Weir, 3rd Ed. 499 A, that if there is *other untainted evidence* against a prisoner, the confession of a co-prisoner may then be

"considered" against him. The principle of sub-rule (b) has therefore, received the judicial *imprimatur* of each of the High Courts.

(*c*) Further, the corroboration must be as well in respect of the identity of all the persons concerned, as of the *corpus delicti*. The question is not whether the story is *generally true*, but whether it is; *true on the particular points which affect the persons accused by them*, because it is just at those points that the reason for suspicion and uncertainty comes into force (*Queen v. Mohesh Biswas supra* at p. 21). In *Queen* v. *Sadhu Mundul*, 1894, 21, W. R., 69, the approver and the confessing prisoner both agreed in representing the accused, S, as having throttled the deceased, and the medical evidence shewed death by strangulation; but it was held that the latter only proved the account of the mode of death given by these two to be correct, but did not in any way prove that S. was the person who caused the death. So also, in *Regina* v. *Budhu Nanku* 1876, I. L. R., 1 B, 475, the conviction was based on the testimony of two approvers not corroborated as to the identity of the appellants except by the confessions of other prisoners, and hence the appellant was acquitted. Where two prisoners pledged a bar of gold, and one of them, in his confession, asserted that it was procured by melting jewels obtained in a dacoity, and there was no other evidence to connect the other prisoner with the offence, it was held that though confessions made by accused persons may be considered as against persons tried together, they cannot be accepted as evidence of any fact necessary to constitute an offence. (*Queen Empress* v. *Kaliyappa Gounden* 1883, *Weir*. 3rd Ed. 494). In *Queen Empress* v. *Dosa Jiva*, 1885, I. L. R., 10 B, 231, the prisoner was released, as "the confession is not corroborated by any independent evidence to show that the appellant was one of the house-breakers." So also in *Queen Empress* v. *Ram Saran*, as there was no independent corroboration of the confessing prisoner and the accomplice to prove that the three appellants were actually engaged in the murder, the Court acquitted them upon that ground. The accomplice and, therefore, *a fortiori*, a co-confessing prisoner must be corroborated not only as to one but as to all the persons affected by his evidence; corroboration of his evidence as to one prisoner does not entitle his evidence against another to be accepted without corroboration (*Queen Empress* v. *Ram Saran* 1885, I. L. R. 8 A, 306.)

The important question now arises, what independent evidence is legally sufficient corroboration of the confessions of a co-prisoner so as to entitle proper weight to be attached to the latter and to justify the Court in accepting them as true, and acting on them? Being evidence of a very defective character, they require especially careful scrutiny before they can be safely relied on (*Queen* v. *Sadhu Mundul* 1874: W.R. 69; *Queen* v. *Naga* 1875, 23 W.R. 24). In such cases the corroborative evidence must be more cogent, and should be more strictly examined by the Court than when an accomplice gives evidence as a witness (*Imperatrix* v. *Ganapabhat* 1889 14 Mo. J. N. S. 20; *Vide* also *Queen* v. *Sadhu Mundul*). There is no doubt as to the sufficiently corroborative character of the testimony of independent eye-witnesses or of confessions made by the accused, in addition to confessions by the co-prisoner implicating him, but the difficulty arises in cases of circumstantial evidence. What is the precise test of sufficiency of corroboration when it consists of circumstantial evidence? What must then be the nature of the corroborating facts? No clear and definite rule has been laid down. In *Queen* v. *Chunder Bhattacharjee*, 1875: 24 W.R. 42, *Jackson J.* seems to have thought that if the other evidence "tended to criminate"—though apparently not sufficient, *per se*, to support a conviction from the confession of co-prisoners—it was sufficient corroboation. A similar view seems to be indicated in *Imperatrix* v. *Bayagi Rom Andu*, 1886 14 I. J. N. S. 348. *Phear J.* went a slight step further in *Queen* v. *Naga* 1875 and was of opinion that where the circumstantial evidence constituted "a very strong *prima facie* case" it was sufficiently corroborative. *Garth C. J.* in *Empress* v. *Ashootosh Chuckerbutty*, 1878, I. L. R., 4 C, 483, did not commit himself to any particular test, but was content with remarking that it must depend on the circumstances of each particular case how far any corroboration would be sufficient, coupled with the confession, to convict a prisoner; but *Jackson* and *MacDonell J.J.* went further again than the Court in the other rulings abovementioned, and held corroboration by circumstantial evidence not to be sufficient "unless the circumstances constituting corroboration would, if believed to exist, support a conviction."

The decided cases appear to be explicable according to each of

the above tests, and may be thus summarized with reference to the sufficiency of particular classes of facts as corroboration :—

(*a*) *Confessions*—(i) confessions of the accused, in addition to confessions of co-prisoners implicating him, *held* most effective corroboration of the latter, *Queen* v. *Jaffir Ali* p. 59, 60; vide *Queen* v. *Baijoo Chowdhry* p. 44 as to prisoners P, S. A & B, where, however, the confessions of co-prisoners were held inadmissible; *Imperatrix* v. *Bayagi Rom Andu*, 1806 *pro tanto* (*Queen* v. *Jaffir Ali* p. 60; *Queen* v. *Baijo Chowdhry*, pp. 44, 45.)

(ii) If the recorded confession of the accused is inadmissible, evidence of the magistrate as to fact of confession having been made to him would be corroboration of the approver or confessing prisoner (*Queen* v. *Jaffir, Ali* p. 60).

(*b*) *Possession or Discovery of Property* (&) *On charge of theft dacoity, dishonestly receiving.*

(i) Possession of property, identified to be stolen property, by, or discovery of the same in the private or secluded premises of the accused, *shortly* after the offence, if clearly proved, and not otherwise explained, and hence not ambiguous, *held* sufficient corroboration of approvers or confessing prisoner (*Queen* v. *Jaffir Ali, pp.* 59, 60, as to 2nd prisoner, who himself dug up from ground certain articles proved to have belonged to deceased; *Queen* v. *Naga*; *Queen-Empress* v. Rām *Saran*).

(ii) If identification of property found or discovered as that stolen is untrustworthy, it is no corrobortion of confessing prisoner, *Queen* v. *Koonjo Leth.* Where a box was one of common description and identification of it was incomplete, *held* it was impossible to rely on it as corrborative of confessing co-prisoner (*Queen* v. *Chunder Bhattacharjee*). Where there was no identification of a gold bar pledged by the accused as that obtained at dacoity, except the confession of co-prisoner, *held*, confession not corroborated (*Queen-Empress* v. *Kaliyappa Gounden*).

(iii) Discovery of property alleged to be proceeds of dacoity with murder shortly after, but under suspicious circumstances, and further no identification of property produced in court as that taken out of the tank, *held* to be insufficient corroboration to support the evidence of approver and the confession of co-prisoner (*Queen* v.

Jaffir-Ali p. 58); absence of formal proof that a box was found in premises of the accused, *held* unreliable to support co-prisoner's confession (*Queen* v. *Chunder Bhattacharjee*).

(iv) Alleged discovery of property shortly after dacoity with murder in a tank near the house of the accused, but open and accessible to anybody, *held* not to be sufficient corroboration of accomplice and confessing prisoner, so as to show that accused was concerned in the offence. (*Queen* v. *Jaffir Ali* p 58.) Finding of stolen property in a stack of the accused, when it is admitted that it might have been placed there without his knowledge by those who carried it there, *held* not corroborative of approver to show accused was one of the dacoits (*Queen* v. *Hardowa*). The finding of stolen property in a shed belonging to accused, but which is situate above a mile from his house, is an ambiguous circumstance, as others besides the prisoner, had access to the place, and does not corroborate accomplice or confessing prisoner (*Queen-Empress* v. *Krishnabhat.*)

(v) Mere production of stolen property by accused, *some months after* commission of crime, not sufficient corroboration of the confession of the other prisoner to prove that offence (house-breaking) with intent to commit theft was committed by the accused, this act being in itself ambiguous, and not inconsistent with the theory of innocence (*Queen Empress* v. *Dosa Jiva*).

(*b*) *On a charge of murder or other injuries to the body.* The possession of property taken from a murdered person is not adequate corroboration of the evidence of an accomplice or confessing prisoner, charging such person in possession, with participation in the murder; though it would, no doubt, be corroborative of evidence that prisoner participated in a robbery, or that he had dishonestly received stolen property (*Queen Empress* v. *Ram Saran*).

(*c*) *Other facts.*

(I) *Absence from home* on night of murder, *held* some slight corroboration (*Queen* v. *Jaffir Ali.* 59); but *held* no legal corroboration in *Queen Empress* v. *Bepin Biswas*),

(II) *Sudden disappearance* after the day of the crime, *held* not of much corroborative weight (*Queen* v. *Baijoo Chowdhry*).

(III) *Presence in company* of other accused on the day of pledging gold bar, not sufficient corroboration of co-prisoner's confession implicating them in a dacoity (*Queen Empress* v. *Kaliyappa*). Presence on the day the deceased was last seen, of all prisoners together, near the place where the body was afterwards found, not sufficient corroboration to implicate them in the murder (*Queen Empress* v. *Ram Saran*).

(IV) *Medical evidence* showing death probably caused as stated by approver and confessing prisoner is not in any way corroborative of their story so far as it goes to implicate the accused, but only as to the mode of death (*Queen* v. *SadhuMundul*).

(V) *Ill-feeling* toward deceased is of importance, as showing motive, only if evidence otherwise strong. (*Queen* v. *Baijoo Chowdhry*).

(VI). *Finding of instrument of crime* (*dao*) with marks alleged to be blood, *a week after*, amounts to very slight corroboration (*Queen* v. *Mohesh Biswas.*)

The only question that now remains is as to the manner of taking into consideration the confessions of co-prisoners, or the relation in which such confessions stand with respect to the other evidence in the case, after they have been sufficiently corroborated. In some of the rulings it has been laid down that they cannot be used as the *basis* of a case, but only as *corroborative* of other independent evidence, because they are not "evidence" (*Queen* v. *Chunder Bhattacharjee*, 1875), or being "evidence," that they are evidence of a very weak nature (*Empress* v. *Ashootosh Chuckerbutty*, 1878, I. L. R., 4 C, 483.

Per Jackson, Mc Donnell & Broughton, J. J.). In other cases, they have been treated as the basis of a case, requiring only corroboration. Practically, however, it does not matter whether the confession is taken as the basis of the case, or the other independent evidence; as, in either case, if the confession is "sufficiently" corroborated, the question of a person's guilt or innocence will depend on the whole of the evidence, the confessions *plus* the other independent eivdence. Perhaps legally speaking, the best course is to take such confessions after "sufficient" corroboration, as one element of evidence, and the other independent evidence, as

another; and to discover from the two taken together, without considering the one or the other as a basis, whether the inference of guilt follows. This seems to coincide with the view of *Garth, C. J.* in *Empress* v. *Ashootosh Chuckerbutty*.

If, however, the one or the other is at all to be taken as the basis, *convenience* and the course adopted in the majority of the cases above mentioned, particularly when there is approver or accomplice testimony, suggest making the confession the basis or the starting point, and then considering how far the independent, direct or circumstantial evidence bears it out. But this is a matter not of *law* but only of *convenience.*

(3) *The confessions of co-prisoners cannot be used as corroborating in any way the evidence of accomplices or approvers either as to identity of the persons charged, or as to the corpus delicti.* The reasons for this rule are (1) that the corroboration, which is needed to make the testimony of an approver-witness trustworthy, should be corroboration derived from evidence which is independent of accomplice and not vitiated by the accomplice character of the witnesses (*Queen* v. *Mohesh Biswas* 1873 19 W R. 16 21; *Regina* v. *Malapa Bin Kapana* 1874, 11 B. H, C. R. 196; *Queen Empress* v. *Krishnabhat,* 1885, I. L. R., 10 B., 319; *Queen Empress* v. *Ram Saran* 1885, I. L. R., 8 A, 306); but the confession of a co-prisoner if given on oath and subject to cross examination, would be evidence of an accomplice, and is really evidence inferior to that of accomplice; hence it cannot be corroboration of accomplices or approvers. (ii). that the tainted evidence of an accomplice or approver is not improved in value by a tainted confession. *Queen* v. *Jaffir Ali* 1873 19 W. R., 16; *Queen* v. *Baijoo Chowdhry* 1876 25 W. R., 43; *Queen Empress* v. *Ram Saran,* 1885 I. L. R. 8 A 306) and if there are two, it is necessary that both should be corroborated (*Queen Empress* v. *Ram Saran*).

In *Queen* v. *Mohesh Biswas* the approver S, and the confessing prisoner, R, both mentioned the co-prisoners M. P. G. and D, as being the perpetrators of the murder, and represented them as engaged in the fields in cutting up and making away with the body. *Phear J* said at p. 25; "It, therefore, corroborates statement of S. in those particulars. The question is, 'does this amount to sufficient corroboration, such as will justify us in accepting as true

and acting on S's testimony'? On the whole I think not." So in *Queen* v. *Jaffir Ali, Glover J* held that such confession "cannot be used as corroborating in any way the evidence of approvers against such other parties" *i. e.*, against the co-prisoners. In *Regina* v. *Molapa Bin Kapana* 1874, 11 B., H. C. R., 195, the Bombay High Court also held that the confession of one prisoner cannot be used to corroborate the evidence of an accomplice against others. The Calcutta High Court again laid down the same rule in *Queen* v. *Baijoo Chowdhry*, 1876: 25 W. R., 43, a conviction based on the testimony of approvers, uncorroborated as to identity of the accused person cannot be sustained, and aconfession of co-prisoner implicating him cannot be accepted as sufficient corroboration of such testimony (*Regina* v. *Budhu Nanku*, 1876, I. L. R. 1 B, 475). The confessions of prisoners are not, as against their fellow-prisoners, who were not present when they were made, such corroborative evidence of statement of an approver as would justify a conviction of the other prisoners thereon (*Queen Empress* v. *Bepin Biswas* 1884: I. L. R, 10 C. 970) In *Queen Empress* v. *Krishnabhat*, 1885, I. L. R., 10 B., 310, *Jardine J.* was similarly of opinion that the evidence of an accomplice could not be corroborated by the confession of a co-prisoner, The Allahabad High Court held in *Queen Empress* v. *Ram Saran*, 1885, I. L. R., 8 A 306, that there must be some corroboration of an accomplice independent of an accomplice or of a confessing prisoner, to show that the party accused was actualy engaged directly in the commission of the crime charged against them. It was also held in *Queen Empress* v. *Alagappan Bali*, 1886, Weir 3rd edition 499 a, and *Imperatrix* v. *Chand Valad Ibrahim*, 1888, that statements of a co-prisoner could not be used against another to corroborate evidence of an accomplice.

As against such other person as well as against the person who made such confession.

A confession by one of several prisoners which is irrelevant or is inadmissible under Ss. 24-26, and *when there is no "discovery" under S. 27*, is inadmissible under S. 30, and is to be wholly rejected as *against* both the maker of it and the person implicated thereby, but it is admissible *in favour of* the latter *Imperatrix* v. *Pitamber Jina*, 1877, I. L. R., 2 B, 61. If it is not inadmissible under Ss. 24-26, against the maker, it is admissible under S. 30

(provided it otherwise satisfies its terms), as well against the one as against the other. If, however, it is not within Ss. 24-26, but there is discovery under S. 27, then so much of the whole statement as leads immediately to the discovery being made admissible thereunder, is also admissible under S. 30 against both, if it is a " confession " on the part of the maker and " affects himself and some other " prisoner, *but not otherwise.* Suppose A, a prisoner says to the police " I and B (co-prisoner) stole some goods. The goods I stole are in a certain place " and the goods are thereby discovered. Under S. 27 the only part of A's statement admissible would be, "The goods I stole . . ." (*Vide* Madras Law Journal, 1895, Part IV pp. 130 *et seq.*), but this would not be admissible under S. 30 against B, as although a " confession," it would not "affect himself and *some other* . . ." If instead of, " the goods I stole . .", he said, " the goods B stole . . .", and discovery followed, this statement would be admissible against A, under S. 27, and would show knowledge on his part of the place of concealment of stolen property, but it would not be admissible under S. 30 against B, not being a " confession " by A of his own guilt, nor " affecting himself and some other." But if A said, " the goods *we* stole . .", when there was discovery, this would be admissible not only against A under S. 27, but also against B, under S. 30, as it would be a " confession " by A, " affecting himself and some other " . . It is only a case of this last kind that was in the mind of the Court when it said in *Empress* v. *Rama Birapa*, 1878, I. L. R., 3 B, 12, A, "if the circumstances made it wholly or *partly* admissible, it ought not to have been set aside at all but " weighed for all purposes with care and discretion " that is, against both. In the case of a confession *partly* admissible against the matter under S. 27, it is admissible, under S. 30, against his fellow prisoner, only when the admissible part is a " confession " of the maker's guilt, and " affects himself and other persons."

If the *admissible part* is a " confession," and " affects " both persons, it cannot be first rejected as against the co-prisoner, on the ground that the *whole* confession was unduly obtained, and then that very part admitted as against the maker, on the ground of discovery : but should be admitted, under S. 30, as against both

(*Empress* v. *Rama Birapa*), though of course, in taking it into consideration, no *weight* would be attached to it, as against the person implicated, unless it was "sufficiently" corroborated and the mere discovery, though it might be sufficient for the conviction of A, in the last case abovementioned, would not of itself (apart from evidence to show the property was found in B's premises and probably put there by him) corroborate A sufficiently as to B being concerned in the theft.

An admission, however, as distinguished from a confession is not admissible under S. 30 "as against such other person," but only against the person who made it: though it may implicate the former fully in the commission of the crime charged against both. *Queen* v. *Bakur Khan*, 1873, 5 N. W. P., H. C. R., 213, to the contrary, is wrongly decided. The only course open to the prosecution, to make use of D's knowledge of the facts against the co-prisoner, was to make him a witness; but his "admissions" as a prisoner jointly tried was not evidence under S. 30 against B.

E. H. MONNIER.

EXCEPTIONS TO SECTION 9 OF THE INDIAN LIMITATION ACT.

We have in a former article attempted to show that the distinction generally made in the Law of Limitation between prior and subsequent disabilities is unreasonable and that all disabilities whether prior or subsequent may be placed on the same footing with respect to any allowance of time that may be made as regards the period during which the disabilities last. The correctness of this view is strikingly illustrated by the fact that there is an increasing tendency to admit various exceptions to the rule enunciated in S. 9 of the Indian Limitation Act and thus to restrict the rule itself in the scope of its operation. In this article we propose to consider the various exceptions to the general rule and state the reasons for such exceptions.

The general rule may be controlled and its application limited in various ways. Thus the subsequent event may be allowed to suspend the operation of limitation so that the period during which the event continues may be deducted in the computation of the

period. The case contemplated in the proviso to S. 9 is a case of suspension. Again the subsequent event may operate to interrupt the course of limitation after it has once commenced to run; so that a fresh period may be computed from the date of interruption. Between a case of interruption and a case of suspension, there is this difference. In a case of suspension, the portion of the period that has already elapsed is not cancelled but is retained and added on, for purposes of computation, to the period which follows the suspension; but in a case of interruption, the already expired portion of the period of limitation is obliterated and a fresh period of limitation is allowed to run from the date of interruption. Again, the subsequent event may operate to virtually extend the period of limitation up to the date when the disability or inability to act, may cease. An instance in point is afforded by S. 5 of the Act, under which by reason of the Court being closed on the last day of the period of limitation, the period itself is extended to the first day the Court re-opens. Again the time during which the subsequent event may last, may be excluded in the computation of the period of limitation as in the cases provided for in S. 13 and in these cases the period of limitation is theoretically held to run, but the intervals during which the subsequent disabling events last are held not to be any portions of the prescribed period. In these cases, there is practically a suspension of the general rule.

Let us now pass on to point out the various exceptions. The proviso to S. 9 formulates only one exception to the general rule. It enacts that " where letters of administration to the estate of a creditor have been granted to his debtor the running of the time prescribed for a suit to recover the debt shall be suspended while the administration continues." The reason of this exception is explained in the case of *Seagram* v. *Knight* L. R. 2. Ch., 632. It is founded upon the principle that where the liability to be sued and the right to sue meet together in the same person, a suit is not possible of institution, for no man can take the absurd step of suing himself. As *Lord Chelmsford* put it in *Topham* v. *Booth* 35 Ch., D. 607 it is clear that where the hand to give and receive is virtually the same, the institution of a suit is not possible. The appointment of an administrator is not by the deceased or any other party but by the Court itself. The grant of letters of administration being thus made by

an act of law, the debt is not deemed to be extinguished but only the remedy for its recovery is suspended during the time the administration lasts—see *Nedham's case* 8 Co. R. 135 (*a*); *Wankford* v. *Wankford* 1 Salk., 299. The proviso does not make any mention of cases where the debtor is the *executor* of his creditor nor of the converse cases where a creditor or a legatee of a debtor becomes the *executor or the administrator* with respect to the estate of the debtor. How does the general rule stand in these cases? In cases where the debtor is the executor of his creditor, does time stop from running after it has once commenced to run? This is also a case where there is the same hand to give and receive. A constructive payment may be presumed in this case and the debt due by the executor will remain in his hands in the shape of realised assets of the testator—see *Brown on Limitation* p. 468; *Banning*, p. 248; *Williams on Executors* Part III. Thus where a debtor was appointed one of several executors of his creditor's will but the debtor-executor did not prove the will till his debt was already barred by lapse of time, it was held that the debt was revived by his subsequently proving the will inasmuch as that proof related back to the date of the testator's death and he was ordered to account for the sum owing with interest, *Ingle* v. *Richards* 28 Beav. 361. "Where a creditor appoints his debtor as an executor and the executorship is accepted, this being a voluntary act of the parties, the debt is extinguished on the supposition of its being paid by the executor to himself and thus becoming assets in his hands for which he is accountable"—*Mitra*, p., 203. Again the view that under such circumstances the debtor cannot take advantage of the Law of Limitation but must hold the debt due by him as trustee for the benefit of the estate which he represents as executor is also amply recognised by the Indian Legislature in S. 87 of the Indian Trusts Act II of 1882. S. 87 provides that "where a debtor becomes the executor or other legal representative of his creditor, he must hold the debt for the benefit of the person interested therein." It is thus clear that in these cases, the debtor cannot claim the benefit of S. 9 and that time even though it has commenced to run can no longer run in favour of the debtor-executor.

The same view is taken in the English Law as regards the case of a creditor becoming the executor of his debtor. It is settled

law that an executor may, in his discretion, pay even the barred debts of the testator. The executor is not bound to take advantage of the statute of limitations, but may, if he thinks fit, satisfy the debt—*Norton* v. *Frecker*, 1 Atk., 526; *Williamson* v. *Naylor* 3 Y & C, 211 note (a); *Williams on Executors*, 6th ed., p. 1664. In *Hill* v. *Walker* 4 K & J, 166, Lord Hatherley, then Vice-Chancellor, made the following observations on this point:—"It certainly cannot, be considered to be law at the present day that executors paying a debt against the recovery of which the statute of limitation might be pleaded as a legal bar, render themselves liable to those interested in the testator's property." And the decisions have even proceeded to the extent of holding the position that an executor may pay barred debts even though the personal estate of the testator is insufficient to pay all the debts with, barred and not barred, and even though the consequence of the payment might prejudice devisees of real estates by rendering the real estates liable to those debts which remain unpaid after all the personal estate is exhausted and which are therefore thrown upon the real estates for payment and satisfaction—*see Lewis* v. *Rumney* L. R. 4 Eq., 451. It follows as a logical extension of the above doctrine, that the executor may pay his own barred debts, that is, barred debts due to him from the testator. Accordingly we find that it is also settled law that an executor may retain for himself assets of the testator sufficient to pay barred debts when due to himself.—*see Stalschmidt* v. *Lett* 1 Sm and Giff 415; *Courtenay* v. *Williams* 3 Ha., 539., *Coates* v. *Coates* 33 Beev., 249; *Hill* v. *Walker* 4 K and J 166; Thus it is clear that here also the question of the *further* operation of limitation cannot arise even though time has already commenced to run. Again the view that where there is the same hand to give and receive, the question of the further operation of limitation cannot arise even though time has already commenced to run, has also been affirmed to hold good in cases where the executor is not an ordinary creditor but a legatee—*see Binns* v. *Nichols* L. R., 2 Eq., 256: *Adams* v. *Barry* 2 Coll., 290; *Prior* v. *Horniblow* 2 Y & Coll, Ex., 200; *Banning on Limitation* p. 247. And the same principle has been held to apply to the case of a creditor or legatee being made the administrator of his debtor. In *Binns* v. *Nichols*, Lord Hatherley then Vice-Chancellor remarked. "Having the whole of the

testator's estate in his hands he could not sue himself, the legacy was either at home—that is to say, it would have been satisfied if there had been assets—or it was kept alive because in ordinary circumstances a bill might have been filed to keep it alive; but this gentleman the administrator could not have taken so absurd a step as to file a bill against himself for the purpose of making himself pay his own legacy." *Banning* observes, speaking of Lord *Hatherley's* reasoning: "This reasoning would seem to apply wheret he executor is an ordinary creditor of his testator': see *Rhodes* v. *Sinethurst* 4 M and W 42" *Banning on Limitation pages* 247 & 248.

Besides the above, there are also other exceptions which are recognized in the Limitation Act itself. Thus the defendant's absence from British India will serve to suspend the operation of limitation even though time has already commenced to run—see S. 13 of the Limitation Act; *Hanumanta Rao* v. *A Bowles* I. L. R., 8 B. 561; *Beake and Co.* v. *Davis* I. L. R. 4 A. 530. The ruling to the contrary in *Narrongi* v. *Mugnirum* I. L. R., 6 B. 103 was expressly dissented from in both the above cases. Again the fact that the plaintiff has been prosecuting *bona fide* a proceeding in a Court without jurisdiction will suspend the operation of limitation during the period for which the *bona fide* proceeding has lasted, even though time has already begun to run—S. 14 of the Act. So also, the fact that an order staying proceedings under S. 20 of the Civil Procedure Code (S. 14 clause 2), the fact that the commencement of a suit is stayed by injunction or order (S. 15.) will suspend the running of time even though it has already commenced to run. Again in cases where a judgment-debtor has been prosecuting a proceeding to set aside an execution sale, the period of limitation prescribed for a suit for possession by the execution—sale purchaser will be suspended from running for the time during which the proceeding of the judgment—debtor lasts, even though time has already commenced to run—S, 16 of the Act. *Buswell* observes; "Another exception arising out of the *necessity* of the case occurs when by act of law, one party is forbidden to sue or the other is made incapable of being sued. Thus the running of the statute of limitations is suspended by an injunction against suit. And mere irregularity in the granting of the injunction will not prevent

it from operating to suspend the running of the limitation" Limitation, pages 189,190. Further the closing of the Court is also under certain circumstances recognized as virtually extending the operation of limitation even though it has already commenced to run—see S. 5. This happens when limitation expires on a day on which the Court is closed. In such cases, the proceeding might be instituted on the day the Court re-opens.

As affording instances where the course of limitation is actually interrupted, we may refer to Ss. 19 and 20 of the Act. In these sections written acknowledgments of liability signed by the defendant or his agent, payments of interest on a debt or legacy by a person liable to pay or by his agent, part-payments of a debt evidenced by the handwriting of the debtor or his agent, receipt of the produce of mortgage lands by the mortgagee in possession, are all recognised as capable of interrupting time from running even though it may already have commenced to run. Indeed the subsequent events mentioned in these sections do, not only, prevent the period of time from running but actually extinguish it and substitute in its place a fresh period of limitation. It is also worthy of remark that in spite of the stringent character of the rule embodied in S. 9, the benefit of S. 7 of the Limitation Act will be extended to all cases of *interruption* of the course of limitation. Thus in *Venkataramaiyar* v. *Kothandaramaiyar*, I. L. R., 13 M, 135, a question arose as to how far S. 9 will prevail in the case of a subsequent disability or inability on the part of the plaintiff when such subsequent disability or inability was not in existence at the time when the original right to sue accrued but came into existence subsequently and continued at the time when an acknowledgment within the meaning of S. 19 was made. It was held that S. 7 applies to such a case notwithstanding that time has already commenced to run. It is enough if the disability is in existence at the time when a *new* period of limitation not necessarily the original period of limitation is reckoned, under provisions like those of S. 19 of the Act. The Court said: "We do not think that S. 9 will take away this privilege since it is not subsequent disability which stops the time from running but the operation of law consequent upon the giving of acknowledgment."

Does S. 9 operate during a state of war in the case of contracts between the subjects of the enemy states? *Hall* says that logical-

ly, warimplies the cessation of existing intercourse, a disability on the part of the subjects of a belligerent to sue or be sued in the Courts of the other, a prohibition of fresh trading or other intercourse and of every species of private contract.—*International Law,* 3rd. Ed., 388. *The Hoop* reported in *Tudor's Leading* cases *Mercantile* and *Maritime* Law, 3rd Ed., 922 to 936 ; S. 430 of the Code of Civil Procedure. It is also settled law that where the cause of action arises *before* the commencement of the war, the right of suit is only suspended and can be asserted on the arrival of peace—See Tudor's *Leading* cases on *Mercantile* and *Maritime* Law, 3rd Ed., p. 946 ; see also *Flindt* v. *Waters* 15 Est, 260 ; *Harwer* v. *Kingston* 3 camph. 152 ; *Exparte Boussamaker* 13 Ves. 71—*Per Eskine L. C. Buswell* writes "It may be stated to be a settled rule of jurisprudence that the operation of the statutes of limitation is suspended during a state of war as to matters in controversy between citizens of the opposing belligerents although the limitation may have begun to run before the commencement of the war, and the exception has been adopted and applied by the Courts as being within the spirit even though not within the letter of the statute." *Buswell on Limitation,* page 186 ; *Hanger* v. *Abbott* 6 Wall 532. And at page 189, Buswell further observes : "It is obvious that when the cause of action accrues during the state of war, the rule can apply only to such ordinary private transactions between the parties as will give the plaintiff a standing in the Court of the belligerents."

Again it appears that under the Indian Law, inability to sue by reason of plaintiff's absence in a foreign place or by reason of his imprisonment or transportation or by reason of his want of funds cannot entitle the plaintiff to any indulgence. Even under the conditions required by S. 7 of the Act such inability to sue will not avail the plaintiff. S. 7 confines itself to certain disabilities specifically mentioned therein. And the latter part of S. 9 contains only a disabling provision and it does not say that prior disablities or inabilities will enable the plaintiff to claim any allowance of time. See also *Mitra, Limitation* 2nd Ed. pages 199 and 200. But in England the statute of 21 James I Ch. 16, S. 7 provides that in the case of personal actions, if the plaintiff shall be at the time the cause of action accrues, *imprisoned* or *beyond the seas* he may

bring his action after the cessation of such inabilities. Also in New York, it appears, that the plaintiff's absence from his state, suspends the running of time whether such absence arises *before or after* the cause of action accrues—See *Buswell* page 155, footnote (2). The apparent hardship of the Indian Law cannot however be much felt in the face of provisions like those of S. 36,—41 of the Code Civil Procedure &c.

The above are some of the main circumstances which are recognised in modern law as capable of affecting the course of limitation, even though time has already commenced to run. It is, no doubt, true that it is for the Legislature and not for the Courts to create exceptions to the law of limitation. "But," as observed by *Buswell*, "the tendency of the modern law is to create judicial exceptions to the operation of the statute in cases where the creditor is stopped from pursuing his remedy *ex necessitate rei* and under circumstances which could not have been anticipated by the legislature," page 185.

Lastly, let us apply the general rule under discussion to a case of fraud. Can it be said that when once time has begun to run, it will continue to do so, notwithstanding the fact that a gross fraud has *since* been practised upon the plaintiff? It is an axiomatic principle of law that no man shall take advantage of his own wrong. Are we to allow this axiom of law to be controlled by the questionable principle embodied in section 9 of the *Indian Limitation Act*? On general reasoning, this question appears to admit of a decisive answer. The party guilty of fraud should not be allowed to count in his favour all that period of time during which his fraud continued. And the soundness of this view has been expressly recognised and given effect to by the Indian Legislature, for instance, in section 34 of the *Indian Transfer of Property Act* 4 of 1882. Under such circumstances the plaintiff cannot be considered to be guilty of any *laches* in not enforcing his right in time and the conduct of the defendant requires the non-imposition of the penalty attached to lapse of time. Section 18 of the Limitation Act does not, however, appear to afford a satisfactory answer to this question. Where the fraud has resulted in the plaintiff being kept out of the knowledge of his right or title as against the defendant, the cause of action is postponed to the

date of the discovery of the fraud. But where *after* the right to sue has accrued, fraud is practised upon the plaintiff, it appears that time will nevertheless run. In other words, in the case of fraud practised by the defendant, or at his instance, subsequently to the date of the accrual of the right of suit, the person guilty of the fraud is placed under no disadvantage and his victim is given no compensating advantage. Para. 2 of section 18 may, perhaps, be interpreted to contemplate, not only cases where the right to sue has not yet accrued, but also cases where the right to sue has already accrued. The effect of this construction would be that where fraud takes the shape of fraudulent concealment from the plaintiff of any document necessary to establish his right, the fact that time has already commenced to run will not signify and the period of limitation will be reckoned anew from the time when the plaintiff first has the means of producing the document or compelling its production. It must here be noticed that the effect of this species of *subsequent* fraud is not merely to give an allowance of the period of time during which the fraud was effectively operating, but to postpone the cause of action that has already commenced and to make it commence from the date of the removal of the fraud in the same way as if limitation had not previously, at any time, commenced to run in that case. But having regard to the ruling in *Lakshminarasu* v. *Aukinid,* 7 M.H.C.R. 23, that a document which is merely useful in evidence is not a 'necessary' document within the meaning of section 18, it is doubtful whether any subsequent fraud could prevent time from running when it has already commenced to run. It is, however, very refreshing to find that so high an authority as *Buswell* is very pronounced in his views on this point-see *Limitation,* section 22, page 32, " In cases where the party defendant has been guilty of fraud upon the complainant by reason of which the statute has by its terms become applicable to bar the action, the Courts of Equity will not apply the limitation. The positive enactment is not allowed to be used against conscience, and an equitable tribunal will supply and administer within its own jurisdiction a substitute for the original right of which the complainant has been fraudulently deprived." And we may conclude this article with the suggestion that the benefit of section 18, or any other appropriate remedy, might as well be extended to all cases of fraud, irrespective of the fraud being prior or subsequent to the date of the accrual of the right of suit.

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NOTES OF INDIAN CASES.

Jaganath *v.* **Makund Prasad,** I. L. R. 18 A, 37. Relying upon the authority of the Privy Council in *Tassa Duk Rasakhan* v. *Ahmad Hussain*, 20 I A, 176, the Allahabad High Court holds that unless evidence is given to connect the material irregularity in the conduct of the sale with substantial injury, the sale cannot be set aside. The decision of the Privy Council is no authority for the position laid down. Neither the case in 20 I. A. 176 nor the decisions in *McNaughtan* v. *Mahabir Prasad Singh*, 10 I. A., 25 and *Arunachelam* v. *Arunachelam* 15 I. A., 171 on which it is based are any authority for the position claimed. S. 311 is clear that material irregulariy and substantial injury by reason of such irregularity should be proved. But we fancy the court may presume the connection between the irregularity and the injury though the presumption is one liable to be easily rebutted if the injury and the irregularity are established.

Ram Niwaz *v.* **Ram Charan,** I. L. R. 18 A, 49. In this case an application for execution within twelve years from the date of the decree was struck off by the court and the attachment continued. An application to continue the former made after the lapse of twelve years was held by *Aikman J.* to be barred. We are unable to accede to this view. There is no warrant in the Code for striking off an application. The subsequent application cannot be deemed to be an application for execution within the meaning of S. 230. It is one to continue the former application and it does not fall within the prohibition contained in S. 230. *Biswa vs. Binanda* I. L. R. 10 C. 416. *Ramkripal* v. *Rupkuari*, I. L. R. 6 A. 269 and *Venkat Row* v. *Bije Singh*, I. L. R. 10 B. 108.

Mukarrah Hussain v. Hurmatun Missa I. L. R. 18 A. 52. If a defendant is exempted from the operation of a decree and in execution of the decree against others prefers a claim, the question arising is not one falling under Section 244. Benerji J. says that the question is not between the parties to the suit. Shephard J. held in *Nagamuthu* v. *Saviri Muthu*, I. L. R. 14 M. that the question was one between the parties to the suit, but did not relate to the execution of the decree. Whichever view be taken the result is the same that the order does not fall within S. 244.

Hurcharan Singh *v.* **Hursingankar Singh,** I. L. R. 18 A. 59 The decision in this case may be perfectly correct, but we do not see how S. 13. of the code could be held to bar the suit. The court which tried the former suit had no jurisdiction to try the subsequent suit

and the language of the Code is "a court of jurisdiction competent to try such subsequent suit." The error arises out of an attempt to press too much into the language of S. 13. The principle of *res judicata* applies to many cases which the language of S. 13 does not cover. Take an ordinary case of a rent suit in the regular courts. The material issue might be whether a valid pattah and muchilikka had been exchanged and the decision of a Revenue Court might have settled the terms of the pattah for a year; and yet it will be difficult to contend that the dicision of the Revenue Court is *res judicata* under S. 13. There is no doubt however that the decision of the Revenue Court is conclusive on the question of the propriety of the pattah. We think the Allahabad Court overlooked the scope of S. 13 in its anxiety to hold that the rule of *res judicata* applied.

Nand Kishore Lal *v.* **Ahmad Ata,** I. L. R.. 18 A. 69. This decision of *Burkitt* and *Blair JJ.* seems open to question. The language of the judgment suggests that there is a confusion as regards the character of a benamidar; he is regarded as a trustee, as their Lordships speak of the real owner as a beneficiary. If the benamidar were a trustee the legal estate would be vested in him and he would undoubtedly be the person entitled to sue. If the mere fact of a property standing in the name of an individual gives him proprietary right sufficient to entitle him to sue, a mere agent is entitled to bring a suit for the recovery of property on behalf of the principal. It seems to us that the benamidar as a mere name lender cannot sue. There have, no doubt, been cases where the benamidar brought the suit, the real owner standing by, the decision in which has been held to bar a second suit by the real owner contesting the former decision. But, such estoppel is no warrant for the position that if objection is taken to the suit of the benamidar he is still entitled to persist in the suit. We prefer to follow the decisions of the Calcutta High Court. Though the language of the judgment of the Privy Council *Gopi Krist Gossain* v. *Ganga Prasad Gossain,* 6 M. I. A., 53 is not altogether free from ambiguity, on principle the Calcutta view appears to be correct.

Akara Panchaiti *v.* **Suba Lal,** 18 A. 83. This decision follows the decision of the Full Bench of the Allahabad Court in I. L. R 13, A. 432. But we are unable to agree with it for we can see nothing in the language of the Transfer of Property Act, preventing the second mortgagee from bringing a suit for sale subject to the prior mortgage. The dissenting judgment of Mahmood J. in that case gives full reasons in support of the Madras view.

The Collector of Muzaffarnagar *v.* **Husaini Begum,** 18 I. L. R. A. 86. It is to be regretted that the Civil Procedure Code contains no rules for bringing in representatives where the devolution of interest takes place not pending the suit or pending the appeal, but after the suit is disposed of and before the appeal is filed. The person against whom is passed the judgment of the Lower Court may die and his representative has to prefer the appeal. He cannot then apply to the Court to be brought upon the record as representative prior to the presentation of the appeal, for, then the time allowed by law for the presentation of the appeal may expire. He must present the appeal as the representative of the party who is dead. It would of course be open to the respondent to raise any objection as to his representative title.

Queen Empress *v.* **Agha Muhammad, Yusuf** I. L. R. 18 A. 88. We are inclined to agree with this decision in preference to that of the Calcutta High Court in *Prosonno Kumar Patra v. Udoy Sant* 22 C. 669 There is a taking of immovable property and we think that it, is dishonest within the meaning of the Code. Because A is indebted to me I have no right to take any other property of his without his consent on the ground that it is inferior in value to the debt which he owes to me. I have no right of property in the effects of A, nor have I a lien upon them; and my taking away his movable property cannot but cause wrongful loss to him.

Lekha *v.* **Bhauna,** I. L. R. 18 A 101. The Full Bench seems to have arrived at an unsatisfactory conclusion. They hold that the rejection of the appeal under S. 549 is not a decree entitling the party aggrieved to appeal. The learned Chief Justice points out that the order does not fall within the definition of *decree* in S. 2 of the Code. An order rejecting an appeal as barred on the ground that it is insufficiently stamped has been held to be a decree. *Ganga Das Dey* v. *Ramjoy Dey* I. L. R. 12 C. 30 *Gulab Rai* v. *Mangli Lal* I. L. R. 7 A 42 and *Rup Singh* v. *Mukhraj Singh* I. L. R. 1. A, 887, 887. The order in question undoubtedly decided the appeal. It appears to us therefore to fall within the definition. The Court no doubt was bound to dismiss the appeal as the order for security was not complied with; but that does not affect the question of a right of appeal. As no appeal is provided against the order for security, it would be open to the party appealing against the rejection of an appeal to contest the propriety of an order requiring security under s. 591. The earlier cases of the Allahabad High Court quoted in the Full Bench judgment appear to us to have been correctly decided,

SUMMARY OF RECENT CASES.

Easement—Right to open Locks on River.

Simpson *v.* **Mayor of Godmanchester**, [1896 I ch. 214 C. A.] Here is a new kind of easement claimed and decreed; new, so far as the Common Law of England is concerned. The plaintiff was the owner of certain locks on the banks of the river Ouse. He was also the owner of certain navigation rights on the river. The defendant corporation was the owner of lands lower down from the locks, on the banks of the river. In times of flood, they had, from time immemorial, without opposition and as of right opened them, or ordered the servants of the plaintiff's predecessors to open them in order to safeguard their own lands from innundation. The plaintiff now sued to restrain the defendants from exercising the alleged right and asserted that they had no such right. An argument was urged on his behalf that the right claimed by the defendants did not fall within any recognised and well established class of easements under the E. Law and that consequently no such easement could be acquired. Lord Herschell in delivering the judgment of the Court of Appeal said that the argument was fallacious and that it was absurd to suppose that every easement must be brought within some particular class which has been recognised. He quite concurred with the definition of the term given at the commencement of Mr. Gale's work on easement and defined it as follows :— "If a right is granted by the owner of land to another person to enter and to do something on the grantor's land for the benefit of the land of that other person, that *prima facie* is an easement." This is almost identical in terms with the definition given in the Indian Easement Act.

Trustee—Partial disclaimer.

In re **Lord and Fullerton's Contract**, [1896 I ch. 228 C. A.] When a person creates a trust and appoints a number of trustees, his intention is that his *cestins que* trust shall have the joint judgment of all the trustees upon all the property subject to the trusts whether in the country or in foreign lands; and it is not competent for any trustee to say "I will attend to others." It is competent for him to say that he will have nothing to do at all with the trusts, but he cannot say that he will accept the office as to some part of the estate and will not accept it as to the rest. This is the principle that was laid down in this case by the Court of Appeal. A testator appointed five persons as the executors of his will. The will dealt with the properties of the testator

both in England and America. Of these five one disclaimed the office of executor and trustee altogether. Another who was a resident and a naturalized subject of the United States, America, executed a deed by which he disclaimed and relinquished the office of trustee and executor and gave up all interest and power over real and personal estate beyond the bounderies of the United States, America. The three remaining trustees entered into a contract to sell a portion of the testator's estate to the plaintiff and after some correspondence the plaintiff took out a summons asking for a declaration that the vendors had not made out a good title, as the foreign trustee's disclaimer was not an effectual disclaimer. The Court of Appeal held that the disclaimer had no effect and that the disclaiming trustee was a necessary party to the conveyance.

Injunction—Implied obligation—Landlord and tenant.

Hudson *v.* **Cripps,** [1896 I ch. 265 *per North J.*] The plaintiff was tenant of a suite of rooms in a certain mansion belonging to the defendant under an agreement with him. The whole building had been at the commencement of the tenancy and long before that occupied as a number of private residential flats. The agreement with the plaintiff contained provision to the effect that she was "not to carry on or suffer or permit to be carried on thereon any trade or business . . . . . nor use the premises or any part of dwelling rooms." The defendant was proceeding to convert the building for use as a club-house and was making certain alterations quite inconsistent with the use of the building as residential flats. The plaintiff's residence, instead of being private, was by these alterations to become an isolated residence in the middle of and surrounded by a large fashionable club occupied by members day and night. The plaintiff sued for an injunction restraining the defendant from so altering the building or using it for any such purpose.

Held (by North J);—That there was an implied obligation on the part of the defendant not to use the premises otherwise than as residential flats and that the injunction ought to be granted.

Custom—Validity.

Edwards *v.* **Jenkins,** [1896 I ch. 308 *per Kekewich J.* A custom for all the inhabitants of several adjoining or contiguous parishes to exercise a right of recreation over a piece of land situated in one of such parishes is bad; but a custom that all the inhabitants of certain district shall have the right of usuing certain lands in the same *district*, for all

lawful games, sports, pastimes &c. is good. The word *district* means some division of a country defined by and known to the law as a parish is. If you allege a custom for a particular village or for certain persons to dance on a green and you prove in support of the allegation, not only that some people danced but everybody who chose danced and played cricket, you have got beyond your custom and your claim cannot be sustained.

The plaintiff sued for an injunction restraining the defendants, inhabitants of his parish from trespassing on his lands and for damages. The defendants pleaded a custom that all the inhabitants of the parish and of the adjoining parishes had, under an ancient and lawful custom, a right of recreation and of exercising and playing all lawful games &c. on the lands in dispute. The evidence adduced by the defendant was of a most general character both as regards the persons using it and the act done.

Held Kekewich J.) ;—That a custom as alleged by the defendant was bad in law and could not be sustained. The defendant asked for amendment of his claim restricting the right claimed to the particular parish in which the land was situated.

Held ;—That having regard to the nature of the evidence adduced which was general and unrestricted both as regards the persons using and the acts done, no such amendment ought to be allowed.

Goodwill—Canvassing old Customers.

[**Anna Trego and William Wilson Smith,** *v.* **George Shatford Hunt,** Appeal Cases, 1896 p. 7.]

The expression "goodwill of a business" is rather very difficult of an exact definition. But a perusal of Lord Herschel's judgment in the case must certainly give one a very fair idea of what it means. The good-will of a business consists more in the personal connection with the customers established by a firm that has been carrying on trade for a number of years, than anything else. It means every advantage that has been acquired by a firm in carrying on its business, whether connected with the premises, or with the name of the firm, or with any other matter carrying with it the benefit of the business. The question that came up for decision before the House of Lords in this case was whether a person who had been taken into a partnership business on the terms that, on the expiration of the partnership the good-will of the business shall belong solely to the other partner, was entitled to take a

list of the names, addresses, and businesses of all the firm's customers, with the express object of canvassing these persons and obtaining their custom for himself, after the expiration of the partnership. After a very elaborate consideration of the principles of the law bearing on the subject, the House of Lords held, overruling the decision of the Court of Appeal, that the retiring partner could not do any such thing and granted an injunction against him. The following points may be taken as settled by the learned judgments in the case; 1. Whenever the good-will of a business is sold the vendor does not, by reason only of that sale, come under an obligation to refrain from carrying on a trade of the same nature as before. 2. But he is not entitled personally, or by letter, or by his agent or traveller, or by any other means, to go to any one who was a customer of the firm and to solicit him to transfer his custom to him or not to deal with the vendee. 3. This restriction on the part of the vendor does not extend to prohibiting him from dealing with the customers of the old firm if they should go to him without his solicitation.

Labouchere. v. *Dawson* (L. R. 13. Eq., 322) approved *Pearson* v *Pearson* (27 Ch. 145) overruled.

Substantial wrong or Miscarriage.

George Bray *v.* **John Rowlinson Ford.** 1896 Appeal cases p. 44.

Order XXXI or 6 of the Rules of the supreme Court runs thus " A newtrial shall not be granted on the ground of misdirection or of improper admission or rejection of evidence . . . . unless in the opinion of the court to which the application is made *some substantial wrong or miscarriage has been thereby occasioned* in the trial " In an action for libel the Jury gave a verdict for large damages in consequence of a misdirection on the part of the judge in plaintiff's favor upon a material part of the libel. The appellate court was of opinion that the nature of the libel was such that with a proper direction the Jury would have been entitled to give, and would probably have given the same verdict and held that no substantial wrong or miscarriage had been occasioned by the misdirection. On appeal the House of Lords reversed the judgment of the Court of Appeal and ordered a new trial. They held that the assessment of damages was the peculiar province of the Jury, that owing to the misdirection by the Judge the Jury had not the real case before them but a wrong one and that as they might have been influenced if the right case was put before them, there had been a substantial wrong or miscarriage.

Interpretation of Statute.

Municipal Corporation of the City of Toronto *v.* **Virgo,** [1896 Appeal Cases, p. 88.]

Where a statute gives power to govern and regulate a trade, it does not, in the absence of an express power of prohibition, authorise the making it unlawful to carry on a lawful trade in a lawful manner. Per Lord Davey. "No doubt the regulation and governance of a trade may involve the imposition of restrictions on its exercise both as to time and to a certain extent as to place where such restrictions are in the opinion of the public authority necessary to prevent a nuisance or for the maintenance of order. But their Lordships think there is a marked distinction to be drawn between the prohibition or prevention of a trade and the regulation or governance of it, and indeed a power to regulate and govern seems to imply the continued existence of that which is to be regulated or governed."

JOTTINGS AND CUTTINGS.

We beg to acknowledge with thanks the receipt of the following Legal publications:—

The Educational Review for March 1896 (*in exchange.*)

Geen Bag for March 1896 (*in exchange.*)

Harvard Law Review for March 1896 (*in exchange.*)

Allahabad Weekly Notes for March 1896 (*in exchange.*)

The Yale Law Journal for February 1896 (*in exchange.*)

The Chicago Law Journal for February 1896 (*in exchange.*)

The Albany Law Journal for 1895-96 (*in exchange.*)

The Law of Limitation and Prescription by Upendra Nath Mitra M.A B.L., Third Edition 1896.—We have nothing but unqualified praise for Mr. Mitra's book on Limitation. It has always appeared to us to be far and away the best book on the Indian Limitation Act. Mr. Shephard's book on the subject is very much out of date. Mr. Starling's is nothing like so comprehensive as Mr. Mitra's work. The lectures are a thorough and full discussion of the principles underlying the various provisions of the Indian Limitation Act and the Law of Limitation in general Mr. Mayne's Indian Penal Code stands at the head of commentaries on Indian Codes. We have no hesitatation in according the next place to Mr. Mitra's book.

Mr. Justice Davies :—Mr. Justice Davies is a conscientious judge There is none more anxious to find out the truth in every case to the best of his lights. But he has got some peculiar ways which he will do well to reform. He has no patience with a witness whom he believes, or imagines not to be speaking the truth in answer to any question. It does not seem to occur to him that he may be mistaken in his judgment as regards the particular answer, but charges the witness immediately with a lie in somewhat stentorian tones. Habitual liars succeed in brazening it out but timid truthful men who happen to be in the witness box for the first time in their lives get completely disconcerted and blunder hopelessly by making the confusion worse confounded. Such a procedure on the part of the learned Judge has not helped in the discovery of truth. We would strongly recommend to him to be more patient and considerate towards witnesses. He ought not to require to be told that many a most respectable man in the novel situation of a witness may make blunders which if fastened upon by the Judge may deprive him altogether of the testimony of the witness.

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The Bar as a Profession.—The Lord Chief Justice of England says—

The Bar still has, and must always continue to have, great attractions. "The law," said Edmund Burke, in his great speech on the taxation of America, "is, in my opinion, one of the first and noblest of human sciences; one which does more to quicken and invigorate the understanding than all the other kinds of learning put together. "But," he adds, "it is not apt, except in those who are happily born, to open and liberalise the mind exactly in the same proportion." The Bar does not, indeed hold out promise of great wealth, but it has distinctions and adequate means in store for those who bring to its pursuit the necessary qualities of mind and of character What are those qualities? It is still to a large extent true to say that, if a youth exhibits talent which shows itself in smartness and facility of speech, such a youth is destined for the Bar. Herein grievous mistakes are often made. All talent is not necessarily talent adapted for success at the Bar, nor is glibness of speech, any guarantee of success at it. No more common mistake is made to confound facility of speech with capacity to speak. The world is full of men who have nothing to say, and say it with ease and even with grace, and even with what sometimes passes for eloquence; but I have never known any man who had something to say which was worth saying who, whatever his difficulties of utterance or natural poverty of language may have been, has not been able to say that something forcibly and well.

The result of the errors to which I have adverted is that there is at the bar, as I know it, a greater amount of talent unfitted for that profession than in any other calling or life. I have known—I know now—men at the Bar who would probably, under different circumstances, have made their mark on journalism, in music, in science, in business, but have been lamentable failures at bar. On the other hand, I have never known a man with suitable natural gifts accompanied by industrious patience who has not had his opportunity at the bar, and his success. He may, indeed, have to wait, but he will not wait in vain. What, then, are the considerations which ought to determine the choice of the bar as a profession. I name love of the profession as the first consideration. I name physical health and energy as the second. No man of weak health ought to be advised to go to the bar. Its pursuit involves long hours of close confinement, often under unhealthy conditions; and the instances of long-continued success at the bar and of lengthened usefulness on the bench in the case of men of weak physique are few and far between. The only two men of weak physique within my own experience (extending considerably beyond a quarter of a century) who achieved marked success, were the late Sir George Mellish and the late Lord Cairns. Both were exceptionally able men, but each laboured under the disadvantage of a weak constitution, and premature death in the case of both of them deprived the world of the prolonged advantage of two minds of the highest judicial character. Love of the profession and health to follow it are, then, the first two considerations. What are the mental qualities to be considered? I answer in a word: Clear-headed common-sense. I place this far above grace of imagination, humour, subtlety, even commanding power of expression, although these have their due value. This is essentially a business, a practical age; eloquence in its proper place always commands a high premium, but the occasions for its use do not occur every day; and the taste of this age (like the taste for dry, rather than for sweet champagne) is not for florid declamation but for clear, terse pointed, and practical speech; common sense and clear-headedness must be the foundation, and upon these may safely be reared a superstructure where imagination and eloquence may fitly play their part. In fine, business qualities, added to competent legal knowledge, form the best foundation of an enduring legal fame. The circumstances of the age—the circumstances, social and political—the "environment," as it is called, largely affect men in all callings, and in none more than in that of law. There remains only one of the main considerations to be taken into account in the choice of the Bar as a profession, namely, ability

to wait. Unless a man has the means to maintain himself living frugally for some years, or the means of earning enough to maintain himself in this fashion, say, by his pen or otherwise, he ought to hesitate before resolving to go to the Bar. I have already said success, even moderate success, rarely comes at once and indeed the youthful wearer of the forensic toga may consider himself fairly lucky if, after three or four years at the Bar, he is making enough to keep body and soul decently together. Sometimes it happens that man meets with immediate and brilliant success, as in the case of Erskine, who, having abandoned his early career in the navy, speedily became eminent at the Bar, and ultimatly sat on the Woolsack; such cases are indeed rare. On the other hand, I have known more than one instance of melancholy failure in the case of men of fair mental gifts who, feeling the pinch of poverty, have got involved in debt and difficulty early in their career, from which, in some instances, they have never emerged.

Evidence—Hearsay contradicting dying declarations.—Held, that dying declarations may be impeached by proof of previous contradictory statements by the deceased. *State* v. *Lodge*, 33 Atl. 312 (Del.)

The general rule is that a witness can be discredited by proof of contradictory statement made out of Court, only where he has been given an opportunity to explain. 1 Green-leaf on Evid; § 462. In accordance with this, such statements have been held inadmissible where it has been impossible to call the attention of the witness to them. *Weir* v. *McGee*, 25 *Tex*; Supp.; 20, where the testimony was by interrogatories, and the witness not in Court. *Craft* v. *Comm.*, 81 Ky. 250 and *Ayres* v. *Watson* 132 U. S. 394, where the witness had died. These cases seem closely in point, and the argument of the Court here is not altogether satisfactory. It is that, since the defence is deprived of cross-examination in the matter of the dying declarations, the previous statements should be admitted without the usual foundation, in order to offset the loss. This sounds like an attempt to make a right of two wrongs. One Judge dissents:—*Harwards Law Review.*

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Evidence—Other Criminal Acts to prove Intent:—Defendant was on trial for manslaughter. One Emma Hall died on February 3, 1895; her death was the result of an abortion. Deceased was shown to have gone to the house at which her death occurred, for the purpose of having a criminal operation performed. Defendant was shown to have attended her from January 25 until her death. Defendant was proved to have concealed and hid about the circumstances of Emma Hall's death.

Held, that the testimony of three witnesses, defendant had performed operations upon them at the house where deceased died, and about the same time, was properly admitted. *People* v. *Seaman*, 65. N. W. Rep. 203 (Mich).

The testimony of these three witnesses tends to prove that defendant treated deceased with the purpose and object of procuring an abortion. Since this evidence has probative force tending to prove defendant's purpose or intent in his attendance upon deceased, the objection that to admit this evidence is to admit evidence of other criminal acts of defendant is not fatal: In *Reg.* v. *Briggs*, 2 Moody & R. 199, the defendant was on trial for robbery; a witness was allowed to testify that defendant has committed another robbery in the same vicinity, and about the same time as the robbery for which defendant was on trial. The authorities fully sustain the admission of the evidence objected to in the principle case. *People* v. *Sessions*, 58 Mich. 594; *Kramer* v. *Com* 87 Pa. St. 299; *Thayer* v. *Thayer*, 101 Mass. III; *Reg*, v. *Gray*, 4 F. & F. 1102; *Reg* v. *Dorset*, 2 cox C. C. 243; *Reg* v. *Garner*, 3 F. and F. 681.—*Harvard Law Review.*

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Judgment, Lien—Priority on After Acquired Land.—The plaintiffs and defendants both had judgments against a third party, who, after the judgments had been rendered, acquired the land in dispute. A statute provided that a lien should arise on any after acquired land in favour of the judgment creditor. The defendants' judgment in this case was senior, and they claimed satisfaction of their judgment in full before the junior judgment of the plaintiffs should attach. *Held*, that the liens of the docketed judgments attaching to the land at the same moment, there should be no priority, and the proceeds of the land should be applied *pro rata* to the judgments. *Moore et. al.* v. *Jordan et. al.*, 23 S. E. Rep. 259 (N. C).

In *Creighton* v. *Leeds Palmer*, & Co., 9 Or. 215, upon the same facts and under a similar statute priority of lien was allowed since the lien was an incident of the judgment, the priority of the lien would be ce-extensive with that of the judgment. This view seems sounder, and is maintained by a dissenting minority in the present case. Previous decisions in another State support neither of these views, but give priority to the judgment creditor, who first proceeds to enforce his judgment. In one case this is explicitly based on the ground that the "writ and not the judgment created the lien." *Bliss* v. *Clark*, 39 Ill, 590; *McDonald* v. *Crandall*, 43 Ill, 231; Freeman on Judgments, § 355. —*Harvard Law Review.*

Property—Landlord and Tenant—Assignment of Rent—Reversion—A. let premises to B. for five years. B. sublet a part of the premises to the defendant for the same time. Defendant assigned his lease to C. with covenant that his liability to B should not thereby be altered. B assigned back to A. all rentals due under his lease to defendant. A then conveyed to plaintiff all his interest in land and existing leases held by him. C. failed to pay rent, and plaintiff sued defendant. *Held* that as B.'s lease to defendant terminated at same time as A.'s lease to B. leaving no reversion in B., B'.s assignment of the rentals to A. amounted to an assignment of the lease of defendant, and this passed to plaintiff by A.'s subsequent assignment. Plaintiff therefore could sue defendant on latter's covenant to B, the effect of which made defendant primarily liable for the rent, and not as mere surety for C. *Latta* v. *Wies*, 32 S. W. Rep. 10,005 (Mo.)

The contention of defendant's counsel was that B. retained a reversion because only the rentals were conveyed to A., and that A.'s assignment of his interest in the land gave plaintiff no right to the rentals which still belonged to A. The Court seems properly to have held that, when B. parted with all beneficial interest in the land, to the very end of his own term, it amounted to a complete assignment.—*Harvard Law Review.*

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Property—Statute of Limitations—Permanent and transient injury done by a Nuisance:—The defendant diverted the course of a stream in 1885, so that it ran against the pier of the plaintiff's. No substantial injury was done until 1890. Plaintiff brings this action for the actual damages suffered. *Held*, the statute of limitation did not commence to run until the actual damage resulted. *Howard County* v. *Railroad.* 32 S. W. Rep. 651 (Mo.)

The case proceeds on the ground that when a nuisance is of such a character that the resulting damage cannot be measured once for all at the time of its creation, but depends upon future events, then the statute of limitation does not apply. for a new cause of action arises with every new encroachment; but when the nuisance has become permanent in its nature, so that the amount of injury can be estimated, then a cause of action arises to which the statute is applicable. 1. Wood on Limitations (2nd Ed), § 180. It is to be observed that the decision is not in conflict with cases which hold that the period of prescription begins to run before there is actual damage. *Dana* v. *Valentine*, 5 Met. 8. See *Wells* v. *New Haven* Co; 151 Mass. 49.—*Harvard Law Review.*

Torts—Deceit—Inability to Perform a Promise.—Defendant contracted with plaintiff to do a certain thing without revealing the fact that, by a contract with a third party, he had put it out of his power to perform. *Held*, that an action for deceit lay. *Traber* v. *Hicks*, 32 S. W. Rep. 1145 (Mo.)—*Harvard Law Review.*

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More Judges wanted :—An economical Chanceller of the Exchequer is, we presume, the chief opponent of the appointment of an additional Judge. It would not be difficult to prove that our judicial system is self supporting, and that litigants are on this ground alone entitled to have their cases tried with all reasonable speed. Taking one year with another, the annual receipts, in the shape of fees, are 125,000 £. less than the expenditure. A close examination will prove this deficiency to be deceptive. It is made up by charging suitors with the pensions of Judges and other Officers of the Courts, which amount each year to over 110,000 £. If this amount is deducted, as it may reasonably be contended that it should be, the balance is 15,000 £., which is fully accounted for by the services which the Judges render the country in the trial of prisoners at the Central Criminal Court and on circuit, and in the hearing of Crown cases in the Royal Courts of Justice.—*The Law Journal.*

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Prisoners giving evidence :—It will be observed from the statements by leading lawyers, on the proposal that prisoners should possess the power of giving evidence, that the chief question that arises in connection with the proposal is the limitation of cross-examination of prisoner-witnesses. With Lord Russel's amendment to the Lord Chancellor's Bill we cordially agree. It would obviously be unjust that, when two men are charged with the same offence, the one who chooses to go into the witness box should be free to make statements to exculpate himself and incriminate the other without having his credibility as a witness thoroughly tested. It is contended that cross-examination as to previous convictions should not be restricted by statute, but be left to the discretion of Judges. To some extent the Lord Chancellor's Bill provides for such a discretion. It will be possible to question a prisoner as to any former offence, not only if he seeks to establish a good character but also if 'the proof that he has committed or been convicted of such other offence is admissible evidence to show that he is guilty of the offence wherewith he is then charged.' The admissibility of the evidence must be decided by the Judge.—*The Law Journal.*